Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIE WHITE and CLARENCE MCCURDY, individually and on behalf of all persons similarly situated,

Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC., SEARS ROEBUCK COMPANY, INC. and ALLSTATE INSURANCE COMPANY INCORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act ("ERISA") is a statutory scheme designed to protect employee pensions and other benefits by providing insurance, specifying certain plan characteristics in detail and setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefits plans. ERISA further requires a fiduciary, whether the plan administrator or employer, to discharge those duties solely in the interest of the participants and beneficiaries. This Court has interpreted the provisions of ERISA relating to fiduciary duties to mean that the fiduciary is obligated to communicate accurate information to beneficiaries about the terms of the plan, including terminating and amending the terms, and must not profit at the expense of the beneficiary.

1. The question presented for review in this regard is whether the Eleventh Circuit Court of Appeals, in affirming summary judgment entered by the district court in favor of the Respondents, failed to heed or apply the principles of ERISA as interpreted by this Court, when the Respondents miscommunicated and/or failed to communicate information about the plan to the Petitioners; altered, amended and eliminated certain coverage provisions to the detriment of the Petitioners; and sought to create a substantial financial hardship on the Petitioners and other similarly situated persons in the event of total disability.

Rule 56 of the Federal Rules of Civil Procedure provide that summary judgment is appropriate only when no genuine issues of material fact exist. The burden of proof lies with the movant for a judgment of a matter of law, which is rarely appropriate when expert testimony is presented to create factual questions.

2. The question presented for review as to this issue is whether the Eleventh Circuit, in affirming the district court's grant of summary judgment in favor of the Respondents, when the Petitioners submitted an undisputed and uncontroverted expert opinion demonstrating the multiple breaches of fiduciary duties by the Respondents in administering, distributing, altering and eliminating certain provisions of the long-term disability plan, so far departed from the well-entrenched rules of federal judicial procedure that this Court should review the record and the evidence and reverse the judgment.

LIST OF PARTIES

The parties to this action include Clarence McCurdy and Willie White, individually, and on behalf of all similarly situated disabled employees who have received demands from Metropolitan Life Insuarance Company, Inc. for lump-sum reimbursements of alleged overpayments of long-term disability benefits.

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The Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per U.W. Clemon) granting the Respondents' summary judgment motion is not published, but is reprinted and attached to this brief as Appendix B. The order of the Eleventh Circuit Court of Appeals (per curiam) affirming the district court is published as *White v. Metropolitan Life Ins.*, 254 F.3d 75 (11th Cir. Apr. 30, 2001), and is attached as Appendix A. The order denying the application for rehearing, entered on June 6, 2001, is not published and is attached as Appendix C.

STATEMENT OF JURISDICTION

On April 11, 2000, the district court entered an amended and final summary judgment against the Petitioners and in favor of the Respondents. The Eleventh Circuit upheld the district court's decision on April 30, 2001, and denied rehearing on June 6, 2001. This Petition is timely filed pursuant to Supreme Court Rule 13 within 90 days thereof. This Court has jurisdiction to review the decisions of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1100 *et seq.* ("ERISA") relevant to this petition include the following:

29 U.S.C. § 1102(21)(A) defines an ERISA fiduciary with respect to the plan as "someone who has any discretionary authority over the administration of the plan."

29 U.S.C. § 1104(a)(I)(A) & (B) provides that

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of enterprise of a like character and with like aims.

29 U.S.C. § 1109(a) prescribes remedies for breaches of fiduciary duties by stating that "any fiduciary who breaches its responsibilities shall be personally liable to return any losses incurred as a result of the breach to the plan."

STATEMENT OF THE CASE

This case arises from the granting of summary judgment in favor of the Respondents, Sears, Roebuck and Company, Inc. ("Sears"), Allstate Insurance Company, Inc. ("Allstate"), and Metropolitan Life Insurance Company, Inc. ("MetLife"), and against the Petitioners, Clarence McCurdy, Willie White and other similarly situated class members. Mr. McCurdy and Mr. White contend that a substantial loss of expected income in the event of disability has occurred as the result of the Respondents' unlawful changes in their long-term

disability policy. It is alleged that these losses in expected income have occurred in hundreds of other instances and will continue to cause substantial losses of disability income to hundreds, perhaps thousands, of Sears' employees in the future.

Review of the Eleventh Circuit's judgment by this Court is necessary to ensure that legal precedent, as it relates to ERISA fiduciaries, is appropriately applied to the facts of this case and to remedy the Eleventh Circuit's abandonment of well-entrenched legal principles of judicial procedure regarding summary judgment.

1. Petitioners are participants in a long-term disability policy of insurance issued by their former employer, Sears, and governed by ERISA. Initially, Sears provided long-term disability benefits to its employees through a contract of insurance underwritten by Allstate until MetLife assumed coverage in January of 1989. Shortly before January 1989, Sears submitted a notice to all its employees announcing that MetLife would be the new insurer of the Sears' long-term disability plan. This notice provided that "there would be no changes in the amount of long-term disability insurance." Although neither Mr. McCurdy nor Mr. White recollect receiving this document, the Sears' personnel department assured them that there would be no changes in coverage.[1]

In contrast to these representations, however, a close examination of the MetLife Plan reveals several critical

1. In September of 1994, Mr. McCurdy received a letter from Sears' Human Resource Center stating that "your long-term disability benefits will continue as long as you remain totally disabled and do not exceed the maximum plan benefit."

changes in coverage. For instance, the MetLife policy provides that if Social Security benefits are received within the twelve-month period following cessation of long-term disability benefits, but the Social Security benefits are not approved retroactive to the **exact time long-term disability benefits were payable**, as determined by MetLife, then the beneficiary can not receive his long-term "total disability" benefits. This is true even if the beneficiary was "totally disabled" and has not worked since his disability. If the Social Security retroactive award of benefits is only slightly later than MetLife's deadline of when long-term disability benefits are payable, then MetLife is not obligated to pay long-term disability benefits.[2]

The following table represents a concise comparison of significant discrepancies between the Allstate and MetLife policies:

	ALLSTATE POLICY	MetLife POLICY
Criteria for Total Disability during the first 12 months after the waiting period.	Due to illness or injury, Participant is unable to perform the material duties of his or her occupation with Sears.	Because of illness or injury, Partici- or her job, or any other job for which he or she is fit based on education, training or experience.

2. An affidavit from Social Security Disability Attorney, Darryl W. Hunt, advises that on average, Social Security Disability determinations take at least two and a half years to conclude, although it is not unusual for a claim to be pending for more than three years.

Criteria for Total Disability after the first twelve months after the waiting period.	Due to illness or injury, Participant is unable to perform the material duties of any gainful occupation for which he or she is reasonably fit, based on training, education or experience.	Due to illness or injury, Participant cannot do his or her job, **or any other job for which he or she is fit based on education, training or experience**, and the Participant has been approved to receive Social Security disability benefits either during **the first 12 months of LTD benefits, or (in the case of a Social Security disability benefit approval that is retroactive to the first date of LTD benefit payments)**, during the 12 months after the LTD benefit is ceased.

Mr. McCurdy was an employee of Sears for eighteen years until he became totally disabled in April of 1993 as a result of a brain tumor.[3] He had been a participant in, and paying premiums on the disability plan, either under the

3. Mr. McCurdy has undergone three brain operations since April, 1993.

Allstate of MetLife policies, for approximately twelve years before his disability. On or about September 16, 1993, Mr. McCurdy applied for disability benefits under the MetLife Plan and began receiving payments each month beginning on or about October 7, 1993, for the next twenty-four months. On or about October 7, 1993, Mr. McCurdy received a letter from MetLife stating that MetLife claimed the right to stop payment of his long-term disability unless he was approved to receive Social Security benefits by the end of a twenty-four month, long-term disability period.

At the end of twenty-four months, Mr. McCurdy had not received his Social Security Disability benefit decision and MetLife terminated his benefits in September or October of 1995. It was not until May of 1996, that Mr. McCurdy received his Social Security Disability award letter. Therefore, he was without any financial support, either through Social Security Disability or the MetLife Disability Plan, for approximately five months. Once his claim for Social Security Disability was approved, MetLife informed Mr. McCurdy by letter that his long-term disability benefits claim was reinstated effective October 1, 1995. However, a subsequent letter from MetLife advised him that there had been an overpayment on his claim in the amount of $31,872.00 and demanded payment in thirty days.

Similarly, Mr. White, who was an employee of Sears for nine years before he became totally disabled in September of 1992, applied for disability benefits on September 29, 1992 and began receiving monthly benefits. On April 29, 1994, however, MetLife also informed Mr. White that his award of Social Security Disability Insurance had resulted in an overpayment of benefits and demanded a lump-sum reimbursement of $15,658.39. MetLife told Mr. White that future benefits would be withheld until the money was received.

In each instance, Mr. McCurdy and Mr. White received notices from MetLife that their monthly payments were reduced to less than $100.00 ($35.00 in the case of Mr. White), upon the granting of Social Security Disability and that lump-sum reimbursement payments were required. There are approximately 1,800 disabled employees who received these demands from MetLife for lump-sum reimbursements of "overpayments" and approximately 130,000 Sears employees bound by the changes in the MetLife Plan for disability benefits. Since January 1, 1989, fifty-three other Sears employees have filed suits relating to disability benefits claimed under the MetLife Policy.

2. The Petitioners contend that MetLife, with Sears' approval, made material and damaging changes to the Allstate policy which resulted in substantial loss of expected income in the event of disability. As a consequence, Mr. McCurdy and Mr. White filed Complaints along with Petitions for Class Actions in the Circuit Court of Greene County, Alabama on September 11, 1996. The Respondents removed the case to the United States District Court for the Northern District of Alabama on October 23, 1996, where the Petitioners amended their Complaints to state claims for violation of and breach of fiduciary duties under ERISA.

The Petitioners also maintain, among other things, that altering the requirements for disability and the manner in which disability claims are administered and reviewed and eliminating any recovery for partial disability benefits make the MetLife Plan unconscionable. To support their position, the Petitioners submitted the affidavit testimony of James A. Hand, who offered his undisputed expert opinion regarding the multiple provisions of the MetLife Plan that are unconscionable. The Petitioners also allege that the

MetLife Plan is void *ab initio* due to the failure of the Respondents to amend the disability plan without following the prescribed corporate procedures.

3. The district court rejected all of the Petitioners' claims, holding that the Sears' long-term disability plan, whether administered by Allstate or MetLife, reserved the right for the administrator to alter, amend or terminate the terms of the plan. The district court also found to be significant the fact that both the Allstate and MetLife plans required repayments of Social Security Disability benefits. Therefore, in response to the Respondents' counterclaim, the lump-sum reimbursements were ordered to be paid by the Petitioners and final summary judgment was granted as to all claims against the Respondents.

4. On appeal to the Eleventh Circuit, the Petitioners sought review of the district court's final order of judgment on the grounds that the record contained numerous questions of fact that remained undisputed by the Respondents and that the district court's decision disregarded the law established by this Court as it applies to ERISA fiduciaries of employee long-term disability benefit plans. After oral arguments were made, the Eleventh Circuit affirmed the district court decision, without an opinion. Application for rehearing was subsequently denied, again with no opinion.

5. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, the Eleventh Circuit's judgment is in conflict with the holding of this Court and *second*, the entry of summary judgment when the Petitioners presented an uncontroverted expert affidavit in opposition to the motion, runs afoul of the rules of federal judicial procedure.

I. The Decision Below Conflicts With Decisions Of This Court.

MetLife ceased Mr. McCurdy's benefits for a period of five months. This right to terminate benefits is in conflict with the provision describing the maximum benefit period, which indicates that monthly benefits will be paid continuously up to a maximum benefit period of age sixty-two or sixty-five, with no indication that there might be gaps in the coverage during which benefits would be suspended because an award of Social Security benefits had not been obtained.

In *Varity Corporation v. Howe*, 516 U.S. 489, 116 S. Ct. 1065 (1996), the United States District Court for the Southern District of Iowa (per Donald E. O'Brien, Chief Judge) entered a preliminary injunction requiring the defendants to reinstate portions of terminated employee welfare benefit plan. The district court found that the employer and owner, acting as ERISA fiduciaries, harmed plan beneficiaries through deliberate deception. The Court of Appeals (Lay, Chief Judge) affirmed in part and reversed in part and subsequently affirmed as modified (per Arnold, Chief Judge).

In *Varity*, a group of beneficiaries of a firm's ERISA benefit plan sued their employer who was acting in the capacity as plan administrator. The employees claimed that the employer deceived them and led them to voluntarily withdraw from the ERISA plan and relinquish their plan benefits. Originally, the employees were beneficiaries of a plan administered by Massey-Ferguson, a subsidiary of Varity Corporation. During a reorganization program, Varity transferred Massey-Ferguson's money-losing divisions into a newly formed subsidiary called the Massey Combines.

During reorganization, Varity induced the Massey-Ferguson employees to voluntarily "switch employers", thereby substituting the new Massey Combines' benefit plan for the former Massey-Ferguson plan in which the employees were previously enrolled. During a special meeting, Varity told the employees that in "switching" plans, their benefits would remain secure and essentially unchanged. It was not revealed to these employees that from its creation, Massey Combines was insolvent.

This Court (per Justice Breyer) granted certiorari and held that: (1) the employer was acting as an ERISA fiduciary when it misled employees regarding the security of their benefits if they transferred; (2) the employer violated fiduciary obligations of ERISA in **misleading** employees; and (3) ERISA authorized lawsuits for individualized equitable relief. With specific reference to the issue of fiduciary responsibility of a plan administrators, this Court commented:

> ERISA requires a "fiduciary" to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA

> § 404(a). To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries expense it not to act "solely in the interest of the participants and beneficiaries."

Varity, *supra*, at 1074-75 (citations omitted).

In determining and administering benefits under the policy in the case at hand, the Respondents were required to do so in a manner consistent with the best interest of the plan beneficiaries. Mr. White and Mr. McCurdy were informed about the new MetLife plan, however, the substance of this information mistakenly assured that there would be **no change in coverage**. The misrepresentation about the coverage available under the disability plan destroys any mutuality of agreement between the plan beneficiaries and plan administrator rendering the MetLife policy void and the Respondents in breach of their fiduciary duties.

Additionally, the terms of the MetLife policy relating to the recovery of long-term disability benefits have been declared ambiguous and confusing to both the plan administrators and insurance industry experts. The videotape presented to the Sears' employees subject to the disability policies demonstrates the deceptive and misleading tactics utilized in reference to the reduction of benefits due to set-offs. The provisions relevant for this appeal were substantively changed and not appropriately communicated to Mr. White and Mr. McCurdy, resulting in an ineffective and unenforceable policy and constitute a violation of the Respondents' fiduciary obligation.

Furthermore, the undisputed evidence reveals that the changes in the MetLife insurance policy benefited the insurance at the expenses of the plan beneficiary. For example, by recovering the set-offs from Social Security and Workers' Compensation, the employee, who is solely responsible for premium payments to the policy, receives no meaningful benefit for the years of monthly contributions to fund the full cost of the benefits. Not only is there little or no risk to the insurance company because it is guaranteed a virtual complete recovery of benefits paid, but the lump-sum payment requirement of the modified MetLife plan imposes an undue and unjust hardship to the recipient of disability benefits.

Again, despite the duty to act in the best interest of the plan beneficiary, the evidence discloses that the Respondents were aware that these changes in the MetLife policy resulted in financial difficulties to Sears' employees. This blatant disregard of the welfare and security is a violation of ERISA and unconscionable according to every legal principle of contract creation and administration and in direct conflict with the legal principles set forth by this Court in *Varity* and its progeny.

The Respondents have made no attempt to distinguish the *Varity* opinion. In the present case, the Eleventh Circuit did not consider or apply the authority established in *Varity*, which has been recognized and followed by the majority of circuits, including the Eleventh Circuit. Therefore, the judgment of the Eleventh Circuit as it relates to the responsibilities and obligations of fiduciaries in administering and determining long-term disability benefits merits a review by this Court and reversal.

II. The Decision Below Has So Far Departed From The Usual Course Of Judicial Proceedings To Warrant This Court's Supervisory Power.

Summary judgment is proper only if there are no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). The burden rests upon the movant to show there are no genuine issue of material fact. As this Court has provided, in reviewing a summary judgment, the unchallenged testimony provided by the Petitioners must be taken as true. *See Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 2207, 141 L. Ed. 2d 540 (1998).

In this case, the Petitioners submitted undisputed expert testimony regarding the patently unconscionable provisions in the MetLife disability policy and lend further support for the proposition that the Respondents acted in violation of ERISA by breaching their fiduciary responsibilities. Specifically, James A. Hand, a certified life underwriter and insurance consultant with over forty years of experience with long-term disability contracts, provided his opinions in opposition to the Respondents' summary judgment motion. Based upon his experience, background and training, Mr. Hand's conclusions, excerpted in part from his affidavit, include the following:

> 1. Even though the printed notices that were allegedly communicated to the Sears' employees indicated that there would be no substantial change in the policies or benefits when the long-term disability policy was assumed by MetLife

from Allstate, there were substantial and material changes as follows:

a. MetLife changed the definition of "Total Disability".

b. MetLife eliminated any partial disability benefits.

c. MetLife changed the way in which the disability claims were administered in that the Allstate policy provides that they had the right to recover excess payments by applying all or part of future payments until the excess was recovered MetLife contract provides that any overpayment must be made in a lump sum. This difference could work a substantial hardship on employees who had to make reimbursements. Again, none of this was ever explained to employees until a claim arose.

2. Further, the communication, in general, to the higher personnel about the long-term disability changes were completely inadequate. A letter from JoAnne Cunningham to Human Resources Manager, dated 7/9/92, admits confusion, even at this higher level of communications, about the effective date of the Social Security off-set handling.

3. Another example of the hardships perpetrated against the employees, as a result of the changes made by MetLife, are indicated in a letter from Marsha Dalton to Human Resources Manager, dated 5/27/92, wherein it was admitted that the MetLife system of claim paying caused the Sears' employees financial difficulties.

4. Further, the contract involving the MetLife long-term disability plan is unconscionable for a number of reasons. The plan is more or less an obsolete type of plan in that the wording is ambiguous and confusing to a layman and in many ways the benefits are illusory because the off-sets from Social Security and Worker's Compensation practically eliminate any meaningful benefit ($35.00 per month minimum is included in the plan) to employees who are not in a high income category. The fact that this policy is entirely paid for by the employee (and no contributions by the employer) make it further unconscionable because the employee is paying for something that he thinks he has (*i.e.*, wage replacement) but because of the off-sets, he receives virtually nothing and there is very little risk, if any, to the defendant insurance companies involved. Therefore, it is my opinion, that if the employees knew and completely understood these off-sets and other provisions, it is highly unlikely that the employees would pay insurance premiums for such coverage.

5. Another indication of how unconscionable the MetLife contract is, and one in which the public good was ignored, is evidenced by the fact

that in the custom, trade, and business of writing long-term disability insurance policies, the usual practice is for the insurance companies to be paid back out of future payments in the event that there is an off-set from Social Security or Worker's Compensation. Such was not the case in the MetLife contract.

6. Additionally, the Allstate contract was unconscionable because the plan is also obsolete in that the wording is ambiguous and confusing and the Worker's Compensation and Social Security offsets practically eliminate any meaningful benefits to employees who are not in a high income category. Again, the fact that the employees pay the full cost to fund the benefits (which are practically eliminated in some cases) makes the plan unconscionable.

7. Further, in observing and evaluating a video tape purportedly shown to employees that participated in both Allstate and MetLife long-term disability policies, the portion of the tape that deals with long-term disability is misleading and/or confusing with reference to the reduction of benefits after receiving Social Security Disability Benefits. Although barely touched upon in the film, one would conclude that the reduction in long-term disability would only occur after Social Security *Retirement* benefits after the age sixty-two or sixty-five. Even though this film was shown to employees who had MetLife policies issued after 1989, they were not informed of the changes. The MetLife long-term disability

> contract is also unconscionable because of the material changes which MetLife attempted to make. The MetLife long-term disability contract is misleading in that, after representing in notices to the Sears' employees, that there would be "no change in the amount of long-term disability insurance", it was "gutted" by material changes as set forth above.

The Eleventh Circuit itself has embraced the principle which discourages summary judgment in cases where expert testimony is relied upon to illuminate the issues of fact in the case. *See Childers v. Morgan County Board of Education*, 817 F.2d 1556 (11th Cir. 1987); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 551 (11th Cir. 1998). In fact, in the present case, there is not a conflict of expert testimony that creates questions of fact, rather, the Respondents have offered no evidence or testimony to rebut or dispute any of Mr. Hand's findings or conclusions.

In consideration of the spirit and application of the Federal Rules of Procedure with regards to judgments as a matter of law, the evidence in the record submitted by the Petitioners is more than sufficient to defeat the Respondents' motion for summary judgment. If Mr. Hand's opinions are taken to be true and viewing the evidence in a light most favorable to the Petitioners, as the law requires the Court to do, the entry of summary judgment was improvidently granted by the district court and affirmed by the Eleventh Circuit. Such a departure from the fundamentals of judicial procedure merits a review and examination of the evidence by this Court.

CONCLUSION

In consideration of the above and foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 30, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15505

D. C. Docket Nos. 96-02781-CV-C-W
96-02782-CV-C-W

WILLIE WHITE, individually and on behalf of all persons similarly situated,

Plaintiff-Counter-defendant-Appellant,

CLARENCE MCCURDY,

Plaintiff-Appellant,

versus

METROPOLITAN LIFE INSURANCE COMPANY, INC., a corporation,

Defendant-Counter-claimant-Appellee,

SEARS ROEBUCK COMPANY, INC., a corporation, ALLSTATE INSURANCE COMPANY INCORPORATION, a corporation,

Defendants-Appellees,

LINDA TUCKER, an individual citizen of the State of Alabama, DEBRA WILLIAMS, an individual of the State of Alabama,

Defendants.

Appendix A

Appeal from the United States District Court
for the Northern District of Alabama

(April 30, 2001)

Before DUBINA and KRAVITCH, Circuit Judges, DUPLANTIER*, District Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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* Honorable Adrian G. Duplantier, U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION GRANTING SUMMARY JUDGMENT DATED AND FILED MARCH 31, 2000 AND ENTERED APRIL 3, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

CV-96-C-2782-W

CLARENCE MCCURDY, individually, and on behalf of all persons similarly situated,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, INC., a corporation, et al.,

Defendants.

CV-96-C-2781-W

WILLIE WHITE, individually, and on behalf of all persons similarly situated,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, INC., a corporation, et al.,

Defendants.

Appendix B

MEMORANDUM OPINION GRANTING SUMMARY JUDGMENT

I. *Introduction*

In this putative class action under the Employee Retirement Income Security Act, 29 U.S.C. § 1100 *et seq.* ("ERISA"), the named plaintiffs Clarence McCurdy and Willie White essentially claim that to their detriment, Defendant Metropolitan Life Insurance Company ("MetLife") and their former employer, Defendant Sears, Roebuck & Company, Inc. ("Sears") made unilateral changes in the Long Term Disability ("LTD") Benefit Plan when Sears switched to MetLife from Defendant Allstate Insurance Company (Allstate), as its carrier. At the core of the Complaint is the contention that the monthly disability benefits of the Plaintiffs are now subject to reduction by the amount of Social Security disability income received as a result of their disability. Defendants have moved for summary judgment. Based on the undisputed facts, the motion is due to be granted.

II. *The Undisputed Facts*

1. Plaintiffs McCurdy and White were participants in a long-term disability benefits plan administered by their Sears.

2. Until December 31, 1988, Allstate served as the claims administrator and insurer of the Sears LTD Benefits Plan.

3. Under the LTD Plan administered by Allstate, it is expressly provided, in the bold section entitled,

Appendix B

"PLAN AMENDMENT AND TERMINATION," that "Although Sears intends to continue the Plan, the Company necessarily reserves the right to modify, amend, suspend, or terminate it at any time." *See* Court File Document 50, Exhibit D.

4. The Allstate-administered Plan also contains the following provision:

AMOUNT OF MONTHLY BENEFIT WHILE TOTALLY DISABLED

> "The monthly benefit payable from the Plan while you are Totally Disabled will not be less than $35 unless Allstate has made payments in excess of the amount actually payable under these LTD Provisions. **Then Allstate has the right to recover the excess by applying all or part of future monthly benefits until the excess has been recovered.**"

See Court File Document 50, Exhibit D.

5. As of January 1, 1999, MetLife became the insurer and administrator of the Sears Plan.

6. The Sears Plan, as administered by MetLife, provides, *inter alia*:

> "REHABILITATIVE EMPLOYMENT
>
> For dates of disability beginning on or after March 1, 1989,

Appendix B

(A) The amount of Monthly Benefits [shall be] the lesser of

– 50% of the first $12,500 of Monthly LTD Covered Earnings, less 50% of any Rehabilitation Earnings, if any, or

– 60% of your Monthly LTF Covered Earnings, **less (a) any Other Income to which you are entitled** and (b) 50% of your Rehabilitation Earnings, if any.

If the sum of your monthly benefit and your Other Income and/or Rehabilitation Earnings is greater than your Monthly LTD Covered Earnings at the time that you became disabled your Monthly Benefit will be reduced so that the sum will not exceed your Monthly Covered LTD Earnings."

See Rider to MetLife Policy entitled "Notice of Changes to Sears Group Long-Term Disability Insurance," Document 50, Ex. "C." (emphasis added).

7. The changes in the Sears Plan accompanying its switch to MetLife were distributed in 1989 to all of the Plan's participants, including Plaintiffs.

8. Plaintiff White applied to the Sears Plan for LTD benefits on September 29, 1992. His application was approved on October 18, 1992 effective retroactively to September 8, 1992. He began receiving the full formula amount of those benefits immediately.

Appendix B

9. White also applied for Social Security disability benefits. On March 15, 1994, the Social Security Administration determined that White was disabled; and it awarded him $15,148 retroactively and $968 thereafter in monthly benefits.

10. After White's Social Security award, MetLife reduced his Plan benefits and sought reimbursement from the retroactive Social Security award.

11. Plaintiff McCurdy filed his application for LTD benefits with MetLife on September 16, 1993. His application was subsequently approved; and his LTD benefits commenced in September of 1993.

12. In February of 1996, the Social Security Administration determined that McCurdy became disabled on April 20, 1993. It awarded him $37,050 in retroactive benefits and $1,196 monthly thereafter.

13. After McCurdy's Social Security award, MetLife reduced his Plan benefits and sought reimbursement from his retroactive Social Security award.

14. When Plaintiffs separately applied for Sears LTD benefits, each of them signed a MetLife agreement to this effect:

> I understand that the plan provides that the amount of Social Security benefits, as described in the Group Plan, for which I or any of my dependents may be eligible, **are to be deducted from the benefits payable under the plan**.

Appendix B

> I agree to send a copy of any award or declination letter received from the Social Security Administration to the Metropolitan Life Insurance Company and **will reimburse such Company in the amount due**, upon commencement of benefits awarded to me under the Social Security Act. Such reimbursement shall cover the period from the date of entitled benefits to and including the date of benefits last paid to me.

See "Reimbursement Agreements," Def. Metropolitan Life Ins. Co.'s and Allstate Ins. Co.'s Supp. Mem. in Support of Mot. for Summ. J. Ex. 1. (emphasis added).

II. *Controlling Legal Principles*

A. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The moving party bears the initial burden of showing that there is an absence of a genuine issue of material fact. For issues on which the non-movant bears the burden of proof at trial, the moving party simply may show that there is an absence of evidence to support the non-moving party's case. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case. *See Sherman v. Helms*, 80 F.Supp.2d 1365, 1369 (M.D. Ga.

2000) (citing *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993)).

If a moving party makes a prima facie showing that no genuine issue of material fact exists, then the burden shifts to the non-movant to overcome that showing by presenting substantial evidence in support of its motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). All evidence and reasonable factual inferences drawn therefrom are viewed in the fight most favorable to the party opposing the motion. *See Glitz v. Compagnie Nationale Air France*, 129 F.3d 554, 556-57 (11th Cir. 1997).

B. OTHER PRINCIPLES

ERISA is a comprehensive and reticulated statute that created a framework for the administration and maintenance of private employee benefit plans. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). Although the statute delineates a myriad of detailed procedural requirements for a plan's implementation and administration, one principle is unequivocally clear: ERISA maintains *no* minimum substantive content for employee welfare benefit plans, and therefore a district court has no authority to draft the substantive content of such plans. *See Hunt v. Hawthorne Associates, Inc.*, 119 F.3d 888, 911 (11th Cir. 1997) (citing *Hamilton v. Air Jamaica Ltd.*, 945 F.2d 74,78 (3rd Cir. 1991). Congress sought to discourage judicial entanglement with the substantive features of ERISA-regulated welfare benefit plans because presumably parties retain a greater degree of freedom to contract between themselves to determine the type and amount of benefits,

and the conditions under which these benefits will be provided under the plan. *See Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822, 832 (N.D. Ala. 1998) (citing *Vogel v. Independence Fed. Sav. Bank*, 728 F. Supp. 1210,1229 (D. Md. 1990)).

Federal courts at every level have consistently held that it is outside the province of the judiciary to regulate the substantive terms of a welfare benefit plan. *See generally Metropolitan Life Ins. Co. v. Travelers Ins. Co.*, 471 U.S. 724, 736 (1985); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *First Capital Life Ins. Co. v. AAA Communications, Inc.*, 906 F. Supp. 1546, 1555 (N.D. Ga. 1995).

III. *Analysis*

Assuming that Sears and MetLife made unilateral changes in the Sears LTD Plan, ERISA does not empower this Court to grant the relief which Plaintiffs seek. The Plan itself confers on Sears the unilateral right not simply to change its terms, ***but to terminate the Plan itself***!

But more important is the consideration that the operative provision did not change. Under the Sears LTD Plan, whether administered by Allstate or by MetLife, beneficiaries must reimburse for payments covered by a subsequent retroactive Social Security award. In that key respect, nothing has changed.

As a last ditch effort to avoid summary disposition, Plaintiffs contend they were "unaware" that benefits paid

by the insurance company would be reduced by the amount of Social Security benefits subsequently paid to them. *See* McCurdy Aff. at 2 and White Aff. at 2. The documents signed by Plaintiffs belie this assertion. *See infra*, fn. 1. And it is now well established under Alabama law that a party has the affirmative duty to read and inspect any document which might affect that person's legal rights or liabilities. *See Ramp Operations Inc. v. Reliance Ins. Co.*, 805 F.2d 1552, 1556 (11th Cir. 1986).

Because Plaintiffs applied for and received social security benefits, the outcome of this case has been preordained by the signed reimbursement contracts. It follows that MetLife may recoup the LTD benefits it paid Plaintiffs while their social security applications were pending.

V. *Conclusion*

For the foregoing reasons, Defendants' Motion for Summary Judgment will be granted by separate order.

DONE this 31st day of March, 2000.

s/ U.W. Clemon
UNITED STATES DISTRICT JUDGE
U.W. CLEMON

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 6, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-15505-DD

WILLIE WHITE, individually and on behalf of all persons similarly situated,

Plaintiff-
Counter-defendant-
Appellant,

CLARENCE MCCURDY,

Plaintiff-Appellant,

versus

METROPOLITAN LIFE INSURANCE COMPANY, INC., a corporation,

Defendant-
Counter-claimant-
Appellee,

SEARS ROEBUCK COMPANY INC., a corporation,
ALLSTATE INSURANCE COMPANY INCORPORATION, a corporation,

Defendants-Appellees,

Appendix C

On Appeal from the United States District Court for the Northern District of Alabama

BEFORE: DUBINA and KRAVITCH, Circuit Judges, DUPLANTIER*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellants Willie White, et al. is DENIED.

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

* Honorable Adrian G. Duplantier, U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

Supreme Court, U.S.
NOV 5 200

No. 01-404

IN THE

Supreme Court of the United States

WILLIE WHITE and CLARENCE MCCURDY, individually and on behalf of all persons similarly situated,

Petitioners.

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC., SEARS, ROEBUCK AND CO. and ALLSTATE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SEARS, ROEBUCK AND CO.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether fiduciary duties arising under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, impose substantive limitations on the terms of a disability benefit plan that would prohibit an employer from (a) adopting a plan that offsets plan benefits by Social Security disability awards and requires reimbursement of the offset amount; or (b) amending the plan's definition of the disability necessary to trigger benefit entitlement.

2. Whether summary judgment dismissing a complaint that alleged breaches of fiduciary duties arising under ERISA is precluded by an affidavit in opposition (a) that does not show that the affiant has personal knowledge of the averments of fact and is competent to testify as to averments in the form of opinions in the affidavit; and (b) that does not purport to contain evidence relevant to the acts alleged to have breached fiduciary duties to the plaintiffs.

LIST OF PARTIES

The parties to this proceeding, in addition to Petitioners, are Respondents Sears, Roebuck and Co.; Allstate Insurance Company; and Metropolitan Life Insurance Company.

Sears, Roebuck and Co. has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS AND ORDERS

The opinion of the United States District Court for the Northern District of Alabama granting Respondents' motions for summary judgment is not published and appears as Appendix B to the Petition for Writ of Certiorari. The order of the United States District Court for the Northern District of Alabama denying the motion of Respondent Sears, Roebuck and Co. to strike the affidavit of James L. Hand is not published and consisted of the word "Denied" stamped on the face of the motion. The order of the United States Court of Appeals for the Eleventh Circuit affirming summary judgment is published as a table case as *White v. Metropolitan Life Ins. Co.*, 254 F.3d 75 (11th Cir. 2001) (per curiam), and appears in full as Appendix A to the Petition for Writ of Certiorari. The order of the United States Court of Appeals for the Eleventh Circuit denying the petition for rehearing is not published and appears as Appendix C to the Petition for Writ of Certiorari.

STATUTORY PROVISIONS AND RULE INVOLVED

1. Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), provides:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other

property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

2. Section 413 of ERISA, 29 U.S.C. § 1113, provides:

No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

3. Federal Rule of Civil Procedure 56(e) provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts

as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

1. Respondent Sears, Roebuck and Co. ("Sears") provided its eligible employees with the annual opportunity to elect or decline long-term disability coverage under the Sears Group-Life and Long-Term Disability Insurance Plan ("the Plan"). The Plan provided that long-term disability benefits were subject to an offset for Social Security disability benefits, and the Plan was administered so that a participant who became eligible for disability benefits under the Plan prior to the determination of his Social Security disability claim would receive unreduced Plan benefits, subject to a duty to reimburse the Plan in the event Social Security disability benefits were granted.

Petitioners White and McCurdy had elected long-term disability coverage for the years in which they subsequently became disabled. They began to receive disability benefits under the Plan, unreduced by any offset, after signing agreements to reimburse the portion of their payments from the Plan that might subsequently be determined not to have been payable due to the receipt of Social Security disability benefits. When Petitioners subsequently were awarded retroactive Social Security disability benefits, however, they refused to reimburse the portion of their Plan benefits representing the Social Security offset. Instead, they brought these consolidated actions in which they alleged that their benefits under the Plan should not be subject to an offset for Social Security disability benefits on the alleged grounds that amendments to the Plan effective in 1989 (that did not alter the substance of the offset provisions of the Plan) were "void ab initio" because "proper corporate procedure was not followed in making said changes," and because the terms of the Plan violated various substantive norms Plaintiffs allege arise under ERISA, or federal common law, or (in some instances) state and federal common law.[1]

2. In 1987 and 1988, Sears insured the Plan's long-term disability benefits under a group policy ("the Allstate Policy") issued by Respondent Allstate Insurance Company ("Allstate"). The summary plan description for the Plan dated September 1987 recited that Sears "reserves the right to modify, amend, or terminate [the Plan] at any time."

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1. Petitioners' original complaints, filed in the Circuit Court of Greene County, Alabama, and alleging claims under state law, were removed to the District Court, where they were dismissed by the District Court with leave to state a claim under ERISA within 20 days. Despite the Petitioners' continued reference to state law theories of recovery in their amended pleadings, the Petition does not appear to seek review of any question of state law.

As of December 31, 1988, Allstate ceased to be the carrier of the long-term disability policy insuring benefits under the Plan, and effective January 1, 1989, those benefits were insured under a group policy ("the MetLife Policy") issued by Respondent Metropolitan Life Insurance Company ("MetLife"). Many features of the Plan (including the long-term disability benefit formula and the offset for Social Security disability benefits) were unaffected by the change in insurance carriers.

Both before and after January 1, 1989, the Plan had a mechanism to replace the participant's income to the full extent of benefits allowable under the Plan while the participant's Social Security disability income application was pending. Under the terms of the Allstate Policy, the Plan would pay the full amount of benefits under the Plan's benefit formula without regard to the Social Security offset, with a right to recoup the Social Security offset if and when Social Security benefits were awarded, provided that the participant submitted proof within 90 days of the first payment that the participant had applied for Social Security. Under the MetLife Policy, after May 1992,[2] the Plan also paid the full amount of benefits allowed by the benefit formula, subject to recoupment of Social Security disability awards, for participants who submitted proof that their Social Security application was pending. Under both the Allstate Policy and the MetLife Policy, participants were required to execute an agreement promising to restore to the Plan the amount of the overpayment made by the Plan once a retroactive award of

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2. Between January 1, 1989, and May 1992, estimated Social Security disability benefits were taken into account in calculating Plan benefits. Petitioners became entitled to benefits under the Plan in September 1992 and September 1993, respectively, and therefore were unaffected by the estimated offset approach.

Social Security benefits had been made. Like MetLife, Allstate sought recoupment of retroactively-awarded Social Security payments in a lump sum.

The MetLife Policy defined "Total Disability" differently from the definition applicable under the Allstate Policy in two respects. First, during the initial 12 months of benefit entitlement, benefits were triggered under the Allstate Policy if the participant were unable to perform the material duties of his own occupation, but benefits were triggered under the MetLife Policy only if the participant were unable to perform the duties of his position or any other position for which he was fit, based on education, training, and experience. Second, after the first 12 months of benefit entitlement, a participant would continue to be eligible for benefits under the Allstate Policy if he were unable to perform the material duties of his occupation or any other occupation for which he was reasonably fit by training, education, or experience, whereas under the MetLife Policy, in addition to meeting this standard, the participant must have been approved to receive Social Security disability benefits during the first 12 months of Plan benefits, or (in the case of a Social Security disability benefit approval that is retroactive to the first date of Plan benefit payments), during the 12 months after the Plan benefit ceased.

3. Petitioner White became totally incapable of performing any occupation due to serious illness. He applied for disability benefits under the Plan and signed a reimbursement agreement with Respondent MetLife on September 19, 1992, in which he acknowledged that Plan benefits were subject to reduction for Social Security benefits and agreed to repay any overpayment caused by a retroactive Social Security award. Upon approval of his application, he began receiving unreduced disability benefits under the Plan,

effective as of September 8, 1992, the date of onset of his disability. On March 15, 1994, the Social Security Administration awarded Petitioner White disability benefits, retroactively to his date of disability, as well as prospectively. Petitioner White's Plan benefit was reduced accordingly, and Respondent MetLife sought reimbursement from Petitioner White of the retroactively-calculated Social Security offset amount.

Petitioner McCurdy became totally incapable of performing any occupation due to serious illness. He applied for disability benefits under the Plan and signed a reimbursement agreement with Respondent MetLife on September 17, 1993, in which he acknowledged that Plan benefits were subject to reduction for Social Security benefits and agreed to repay any overpayment caused by a retroactive Social Security award. Upon approval of his application, he began receiving unreduced disability benefits under the Plan, effective as of September 7, 1993. Petitioner McCurdy's application for Social Security disability benefits was not approved within 24 months of his initial receipt of Plan benefits, and his benefit payments under the MetLife Policy were discontinued as of October 1, 1995. In February 1996, the Social Security Administration awarded Petitioner McCurdy disability benefits retroactively to April 20, 1993. After his favorable Social Security determination was received, Petitioner McCurdy's benefits under the Plan for the period following September 1995, were restored retroactively following their suspension.

Both Petitioners refused to comply with demands for reimbursement of the offset amount represented by their Social Security awards.

4. On September 11, 1996, each Petitioner filed a complaint in the Circuit Court of Greene County, Alabama, seeking relief from the substantive terms of the Plan, including the Social Security disability offset provisions, under various state law theories. Following timely removal and dismissal of the complaints with leave to state a claim under ERISA, each Petitioner filed an Amended Complaint in his case, alleging that the 1989 amendments to the Plan were "void ab initio pursuant to the Federal Common Law in that the proper corporate procedure was not followed in making said changes," and that the substance of the Plan's provisions violated (or was otherwise partially unenforceable under) the fiduciary duty provisions of ERISA or various common law doctrines of contract, estoppel, fraud, misrepresentation, ambiguity, and "Breach of Federal Common Law Trustees Duties." Petitioners also alleged in purely conclusory terms, as a separate count, that "numerous sections of the ERISA Statute were violated by the defendants separately and severally . . . [entitling Petitioners to] protection with reference to enforcement of certain provisions of the ERISA statute and/or provisions of the terms of the plan."

Respondents Sears and Allstate answered the Amended Complaint, while Respondent MetLife answered and counterclaimed for the Social Security offset amounts due under the terms of the Plan and the reimbursement agreements. Respondents subsequently moved for summary judgment. Among the papers Petitioners submitted in opposition to the motion for summary judgment was the Affidavit of James A. Hand, a charter life underwriter and insurance broker ("the Hand Affidavit"), setting forth "certain opinions and conclusions concerning the Long-Term

Disability policies that affected the plaintiffs."[3] Among these opinions and conclusions were averments as to the state of mind of employees eligible to elect coverage under the Plan; statements of what employees concluded from written materials provided to them regarding the Plan; a statement that the MetLife Policy was "unconscionable"; statements of what "one would conclude" from a videotape relating to the Plan provided by Sears; and an averment that the MetLife Policy was "more or less an obsolete type of plan."

Invoking the requirements of Fed. R. Civ. P. 56(e), Respondent Sears moved to strike the Hand Affidavit on the grounds that there was no showing of personal knowledge that would permit Mr. Hand to testify as to the assertions of fact contained in the affidavit; that it affirmatively appeared that Mr. Hand had no personal knowledge that would permit him to testify as to certain assertions of fact contained in the affidavit; there was no showing in the affidavit of Mr. Hand's qualifications to opine on any topic other than perhaps selling insurance; that the conclusory statements contained in the affidavit were unsupported by any averments of fact and were

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3. The Petition characterizes the Hand Affidavit as "undisputed expert testimony." Petition, 7. In fact, the opinions in the Hand Affidavit on which Petitioners would rely in this Court were sharply contradicted by Mr. Hand himself in a subsequent deposition. In its Supplemental Memorandum of Law In Support of Its Motion for Summary Judgment and its Renewed Motion for Summary Judgment, Sears provided the District Court with a summary of the pertinent part of Mr. Hand's deposition testimony — *i.e.*, that the Plan was valuable to any number of people; that under the MetLife Policy the Plan was "a great deal" for people who received a fairly high Plan benefit; that if a person thought rationally, receiving even the minimum benefit under the Plan was a good deal; and that even people who never became disabled derived something of value from the Plan because they received protection.

inadmissible; and that certain conclusions were phrased in such a vague manner that they would be inadmissible. The District Court denied the motion to strike and denied the motions for summary judgment.

Respondents subsequently filed renewed motions for summary judgment. The District Court filed a Memorandum Opinion Granting Summary Judgment, dated March 31, 2000, and entered an Amended Final Judgment on April 11, 2000, granting summary judgment in favor of each Respondent and against the Petitioners. Petitioners appealed the order. On June 19, 2000, the District Court entered a Second Amended Final Judgment stating in part that judgment "is hereby entered" in favor of MetLife on its counterclaims. Petitioners' appeal from the June 19, 2000, order was dismissed for want of jurisdiction. *White v. Metropolitan Life Ins. Co.*, No. 00-12227-AA (11th Cir. Sept. 11, 2000). On September 22, 2000, the District Court entered a Third Amended Final Judgment specifying the monetary relief to MetLife on its counterclaim. On appeal from the Third Amended Final Judgment, the Court of Appeals for the Eleventh Circuit affirmed in a per curiam opinion, citing 11th Cir. Rule 36-1.

REASONS FOR DENYING THE WRIT

The Petition should be denied because it does not raise any important question of law, there is no conflict between the decision of the Court of Appeals and any decision of this Court, the factual issues sought to be raised by the Petition do not merit review by this Court, and the order affirming the grant of summary judgment for the Respondents dismissing Petitioners' claims can be affirmed on bases not implicated by the questions as to which certiorari is sought.

I. The First Question On Which The Petition Seeks Certiorari Does Not Merit Review By This Court.

The first question as to which Petitioners seek certiorari, as stated in the Questions Presented in the Petition, encompasses two distinct issues: whether ERISA imposes substantive restrictions on the terms of disability plans that would prohibit the Social Security offset provisions of the Plan and the more restrictive definition of "Total Disability" in the MetLife Policy, and whether the decision of the Court of Appeals conflicts with this Court's holding in *Varity Corp. v. Howe*, 516 U.S. 489 (1996).[4] Neither presents an important issue of law as to which this Court should exercise its discretionary jurisdiction.

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4. The Petition recites that "Petitioners also allege that the MetLife Plan is void *ab initio* due to the failure of the Respondents to amend the plan without following the prescribed corporate procedures [*sic*]." Petition, 7-8. Nonetheless, it seems clear that certiorari is sought only with respect to Petitioners' claims that Respondents breached fiduciary duties under ERISA. *See* Petition, i-ii (". . . whether the Eleventh Circuit . . . when Petitioners submitted an undisputed and uncontroverted expert opinion demonstrating multiple breaches of fiduciary duties by Respondents . . . so far departed from the well-entrenched rules of federal judicial procedure that this Court should review the record and the evidence . . .") *and* 12 ("the judgment of the Eleventh Circuit as it relates to the responsibilities and obligations of fiduciaries . . . merits a review by this Court . . ."). In any event, the disposition of Petitioners' claim that the MetLife Policy was void does not raise any issue that merits review by this Court. *See* Part I.C, *infra*.

A. ERISA Clearly Does Not Impose Substantive Limitations On Plan Sponsors In The Design Or Amendment Of Disability Benefit Plans.

The first of Petitioners' Questions Presented asks this Court to rule on the extent to which ERISA (or perhaps federal common law developed under ERISA) might constrain a plan sponsor's choices where the plan sponsor "altered, amended and eliminated certain coverage provisions" in a long-term disability plan and (as Petitioners would have it) "sought to create substantial financial hardship on the Petitioners." Petition, i.[5] To the extent that this is the issue on which Petitioners seek certiorari, the writ should be denied because the answer is already clear.

This Court has ruled that "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). The amendment of a welfare plan to eliminate benefits entirely does not state a cognizable claim under ERISA. *See Id.* at 78. An employer is not constrained by ERISA's fiduciary duties in its exercise of its power to amend an employee benefit plan. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 889-892 (1996) (employer does not act as a "fiduciary," as defined in Section 3(21)(A) of ERISA when amending a plan).

Similarly, there is no federal common law rule under ERISA that imposes a substantive limitation on an employer's

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5. Pursuant to Supreme Court Rule 15.2, Sears respectfully suggests that Petitioners' first Question Presented contains a misstatement of fact insofar as it could be read to suggest that there was evidence in the record that Sears intended to create a financial hardship for any Plan participant.

ability to adopt or amend the terms of a long-term disability plan, and no such rule should be created. Just as federal common law developed under ERISA cannot contravene the statutory text, *see Mertens v. Hewitt Associates*, 508 U.S. 248, 259 (1993), Sears respectfully submits that no federal common law rule should be adopted under ERISA that would interfere with Congress' goals in enacting ERISA. *See, e.g., Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("Federal common law must be consistent, not only with the language, but also with the policies of the federal statutory scheme in question.") (citing *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456-57 (1957)). Promoting the voluntary adoption of employer-sponsored benefit plans was one of the purposes of ERISA. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (one of Congress' goals in enacting ERISA was to avoid a system under which "administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place"). Adoption of a substantive restriction on the design or amendment of benefit plans as a matter of federal common law would run counter to the Congressional goal of encouraging voluntary adoption of such plans. *Cf. Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) (employer's freedom to reduce benefits by plan amendment encourages the adoption of more generous benefits at the outset).

B. There Is No Conflict Between The Decision Of The Court Of Appeals In This Case And The Opinion Of This Court In *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

Petitioners also seek certiorari to determine whether the Eleventh Circuit "failed to heed or apply" this Court's ERISA jurisprudence "when the Respondents miscommunicated and/or failed to communicate information about the plan to Petitioners." Petition, i. More specifically, Petitioners claim the decision of the Court of Appeals is inconsistent with this Court's decision in *Varity Corp., supra*. Petition, 9-12. There is no conflict between the decision of the Court of Appeals in this case and this Court's opinion in *Varity Corp.*

In *Varity Corp.*, this Court held that "[t]o participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense" violates the statutory duty of loyalty created by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). *Varity Corp., supra,* 516 U.S. at 506. No issue of "deceiving" plan participants is presented on the record in this case — much less an issue of "knowingly and significantly" deceiving plan participants. Petitioners acknowledge that the summary of material modifications announcing the change in carriers for the Plan provided that "this change does not affect the amount of your Group Long-Term Disability Insurance." In fact, there was no change in the amount of coverage under the Plan as the result of the change in carriers and, therefore, there was no misrepresentation or deception. Moreover, the Hand Affidavit contained an averment that the MetLife Policy "is entirely paid for by the employee (and no contribution by the employer)." It follows from Petitioners' adoption of this statement that no actions were taken "to save the employer money." *See Varity Corp., supra*, 516 U.S. at 506.

Furthermore, the record in this case does not implicate this Court's holding in *Varity Corp.* Petitioners do not recall receiving the summary of material modifications announcing the change in insurance carriers, *see* Petition at 3, and alleged that a requested copy of the MetLife Policy had not been provided, and so Petitioners would have been in no position to demonstrate reliance on any misrepresentations alleged to be contained in those documents. Petitioner White testified in his deposition that he never saw an informational videotape regarding long-term disability benefits, and Petitioner McCurdy testified that he could not recall whether he had seen the videotape shown to him at his deposition. The only instance of any claimed "miscommunication" referred to in the Petition is Petitioner McCurdy's claim that he "received a letter from Sears' Human Resource Center stating that 'your long term disability benefits will continue as long as you remain totally disabled and do not exceed the maximum plan benefit.' " Petition, 3 n.1. September 1994 post-dates Petitioner McCurdy's election to be covered under the Plan and the commencement of his receipt of benefits under the Plan.[6]

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6. In this Court, Petitioners also claim that they were "mistakenly assured that there would be **no change in coverage.**" Petition, 11 (emphasis in original). A determination by a Court of Appeals regarding the significance, if any, of an inaccuracy in a communication to a plan participant arising from a mistake certainly does not conflict with any holding of this Court in *Varity Corp.*

C. If The Petition Seeks Review Of The Disposition Of Petitioners' Claims That The MetLife Policy Was Void, Certiorari As To Issues Bearing On Those Claims Should Be Denied.

To the extent the Petition seeks review of the disposition of Petitioners' claims that the MetLife Policy was "void *ab initio* due to the failure of the Respondents to amend the disability plan without following the prescribed corporate procedures," *see* Petition at 8, certiorari should be denied.

This Court has held that the requirement of ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), that the plan document describe an amendment procedure for the plan, is satisfied in the case of a plan maintained by a corporate employer by a statement that "the corporation" has the power to amend the plan, and that whether a particular amendment was adopted in compliance with the procedure implied by such a description depends upon whether, under applicable corporate law principles, the amendment was approved by persons with the express or implied authority to do so, or was subsequently ratified. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 76-81, 85 (1995). Sears presented the District Court with uncontroverted evidence of execution of the application for the MetLife Policy by an officer authorized by a resolution of its Board of Directors to "execute and deliver . . . contracts, agreements, documents and instruments pertaining to personnel administration," and uncontroverted evidence of execution of an amendment to the MetLife Policy and execution of a summary of material modifications pertaining to the Plan by an officer authorized by its Board "to take any and all action on behalf of the Company relating to any existing or proposed employee benefits." There is no basis to question the sufficiency of

this evidence as proof of adoption of Plan amendments by authorized officers of Sears. *See, gen'ly,* N.Y. Bus. Corp. Law § 715(g).[7]

Sears also presented the District Court with uncontroverted evidence that the terms of the MetLife Policy were placed into effect. In general, under New York law, a corporation may ratify the acts of its agents, and ratification may be inferred even from informal acquiescence in and approval of those acts. *O'Grady v. Howe & Rogers Co.*, 152 N.Y.S. 79, 83 (N.Y. App. Div. 1915), *quoting Hoyt v. Thompson's Ex'r*, 19 N.Y. 207, 218 (1859), *writ of error dismissed sub nom. Hoyt v. Sheldon*, 66 U.S. 518 (1862). Under New York law, where a corporation engages in the mere process of availing itself of an insurance contract, enjoying its benefits, and acting in accordance with its terms, there is sufficient evidence to ratification of the contract. *Bommer v. American Spiral Spring Butt Hinge Mfg. Co.*, 81 N.Y. 468, 473 (1880). In fact, under New York law, acts of a corporation that are in accordance with a contract ratify both the contract and the authority of the officer who entered into it. *Tchaika Renewal Co., Ltd. v. City of New York*, 648 N.Y.S.2d 96 (N.Y. App. Div. 1996).

Sears respectfully suggests that certiorari should not be granted to review the application of settled state law doctrines to uncontroverted facts.

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7. Sears is incorporated in New York.

II. The Second Question On Which The Petition Seeks Certiorari Does Not Merit Review By This Court Because The Record Does Not Clearly Demonstrate Misapplication Of The Standard For Granting Summary Judgment In the Courts Below, The Order Affirming Summary Judgment Is Consistent With The Proper Application Of Federal Rule Of Civil Procedure 56(e), And Resolution Of The Question Would Involve Nothing More Than Application Of The Abuse Of Discretion Standard To A Specific Evidentiary Issue.

Petitioners' second Question Presented asks this Court "to review the record and the evidence and reverse the judgment" on the grounds that the Court of Appeals "departed from the well-entrenched rules of federal judicial procedure" by affirming summary judgment against them despite their submission of what they characterize as "undisputed and uncontroverted expert opinion demonstrating . . . multiple breaches of fiduciary duties." Petition, ii. Sears assumes that with this question, Petitioners seek to invoke that branch of certiorari jurisprudence represented by Supreme Court Rule 10(a)'s reference to the exercise of this Court's supervisory power in cases where a Court of Appeals has sanctioned a departure from the accepted and usual course of judicial procedures of sufficient magnitude to merit certiorari jurisdiction. *See* Petition, 17 ("If Mr. Hand's opinions are taken to be true and viewing the evidence in a light most favorable to the Petitioners . . . summary judgment was improvidently granted by the district court and affirmed by the Eleventh Circuit.").

This case does not present an instance of misapplication of the standard for granting summary judgment under

Fed. R. Civ. P. 56(c). A motion for summary judgment is properly granted where "there is no genuine issue as to any *material* fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (emphasis added). The Hand Affidavit certainly did not create a genuine issue as to any material fact on Petitioners' fiduciary claims. Statements in the Hand Affidavit directed at the substantive terms of the Plan were utterly immaterial, since an employer does not act in a fiduciary capacity in designing or amending an employee benefit plan. *See Lockheed Corp. v. Spink, supra*, 517 U.S. at 889-92. Statements in the Hand Affidavit directed at the substance of communications with Plan participants were not relevant to communications with the Petitioners themselves. As noted above, Petitioners denied having seen the insurance contracts at the time their actions were filed, cannot recall whether they received the summary of material modifications announcing the change in insurance carriers, and either deny or do not recall seeing the videotape on which the Hand Affidavit comments. *See* 15, *supra*.

Furthermore, the District Court correctly stated the applicable standard for granting summary judgment where the movant has made a prima facie showing that no genuine issue of material fact exists. Under those circumstances, the District Court held that "the burden shifts to the non-movant to overcome that showing by presenting substantial evidence." *McCurdy v. Metropolitan Life Ins. Co.*, No. 96-C-2782-W (N.D. Ala. Mar. 31, 2000), *reprinted in* Petition, Appendix B, 9a (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In light of the District Court's description of the non-moving party's burden to "present[ ] . . . *evidence*," the District Court's opinion should be read to have ruled implicitly that the Hand Affidavit did not meet the requirements of Rule 56(e). *McCurdy, supra*,

reprinted in Petition at 9a (emphasis added). To be sure, the District Court had earlier denied Sears' motion to strike the Hand Affidavit, but a District Court clearly has the authority to reverse its own prior ruling regarding the admissibility of evidence. *See, e.g., Tang v. Department of Elderly Affairs*, 163 F.3d 7, 11 (1st Cir. 1998). To interpret the action of the District Court otherwise presumes that the District Court regarded the Hand Affidavit as admissible on the renewed summary judgment motion but simultaneously chose to ignore it, which is to presume a potential error when the District Court's opinion is clearly capable of being interpreted to be free from such an error. Error should not be presumed, and the opinion of the District Court should be interpreted not to reflect error. *Cf. Morgan v. Daniels*, 153 U.S. 120, 123-24 (1894) (the judgment of the court below is assumed to be correct until the contrary appears). "It is not sufficient to produce a record from which it does not appear whether it is right or wrong." *The Ship Potomac,* 67 U.S. 581, 584 (1862). Error is not to be presumed but must be affirmatively shown, and all doubts are to be resolved in favor of a judgment rather than against it. *Merryman v. Bourne*, 76 U.S. 592, 600 (1870).

Furthermore, there is no meaningful sense in which the Court of Appeals could be said to have "sanctioned . . . a departure" by the District Court from "the accepted and unusual course of judicial proceedings" on a motion for summary judgment, even if one were to assume that the Hand Affidavit demonstrated the affiant's competence to testify in opinion form and the affiant's personal knowledge of averments of fact, that it contained admissible evidence raising a genuine issue of material fact, and that the District Court consciously chose to ignore it. *Cf.* Supreme Court Rule 10(a). In the portion of its initial brief before the Court

of Appeals styled "Argument," Petitioners did not argue that the District Court had erred, in ruling that there was no genuine issue of material fact, by failing to consider the Hand Affidavit. Brief and Argument of Appellants Clarence McCurdy And Willie White, Individually And On Behalf Of All Persons Similarly Situated, 27-29. To be sure, Petitioners quoted the Hand Affidavit in its entirety elsewhere in their Argument, but there the Hand Affidavit was invoked to support the proposition that "The Met Life Plan and the Changes Met Life made and Sears Agreed to, are unconscionable." *Id.*, 14-21.[8] It was not until their reply brief

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8. In the portion of their Eleventh Circuit brief styled "Summary of Argument," Petitioners claimed to contend that the Hand Affidavit, along with various other documents submitted in the case, "clearly present substantial evidence and create genuine issues of material fact regarding every Count" in Petitioners' Amended Complaints "with the possible exception of Count Three relating to Federal Common Law Estoppel." *Id.*, 13. However, this contention is not reflected in the portion of their brief styled "Argument." It is apparent that the Court of Appeals for the Eleventh Circuit regards strict fidelity of the summary of the argument to the argument itself as a matter of importance. *Compare* Fed. R. App. P. 28(a) *and* subdivision (8) ("The appellant's brief must contain . . . (8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief . . .") *with* 11th Cir. Rule 28-1(j) ("The opening briefs of the parties shall also contain a summary of argument, suitably paragraphed, which should be a clear, accurate and succinct condensation of the argument *actually* made in the body of the brief.") (emphasis added). Limiting an appellant to the arguments advanced in the body of the argument certainly would be an appropriate method of enforcing the strict fidelity requirement of 11th Cir. Rule 28-1(j), and there does not appear to be any reason for this Court to require a Court of Appeals to regard an argument as having been advanced on appeal where it appears only in a purported summary of an argument and not in the argument itself.

in the Court of Appeals that Petitioners argued that "The Testimony Of Expert Witness James A. Hand Demands Reversal" and that "Eleventh Circuit Reverses Summary Judgments Where Expert Testimony Creates Material Issues Of Fact." Reply Brief Of Appellants Clarence McCurdy And Willie White, Individually And On Behalf Of All Persons Similarly Situated To Briefs Of Appellee, Sears, Roebuck & Company, Metropolitan Life Insurance Company, Inc. And Allstate Life Insurance Company, Inc., 2, 10. Thus, far from sanctioning a departure by the District Court from accepted practice, the Court of Appeals may simply have been enforcing the well-recognized principle that an argument raised for the first time in a reply brief will not be considered. *See, e.g., Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 370 (7th Cir. 2001) ("It is well-settled that parties may not raise new arguments or present new facts for the first time in reply.") (citing Fed. R. App. P. 28(c) and *Sims v. Mulcahy*, 902 F.2d 524, 536 n.5 (7th Cir. 1990)); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427 & n.52 (5th Cir. 1999); *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999).

Finally, the question of the admissibility of expert testimony on a motion for summary judgment is reviewable under the abuse of discretion standard. *General Elec. Co. v. Joiner*, 522 U.S. 139, 143 (1997). There certainly was no abuse of discretion in treating the Hand Affidavit as inadmissable given its facial non-conformity with the requirements of Rule 56(e). Moreover, application of the abuse of discretion standard to the specifics of the Hand Affidavit would not involve principles of broader importance justifying exercise of this Court's discretionary jurisdiction.

III. The Order Of The Court Of Appeals Affirming Summary Judgment For The Respondents Dismissing Petitioners' Claims Is Subject To Affirmance On Grounds That Are Not Implicated By The Questions On Which The Writ Is Sought.

Where the order as to which review by certiorari is sought would be affirmed on grounds other than the ground on which review is sought, certiorari should be denied. *Cf. The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 181, 182-85 (1959) (writ of certiorari to review whether action in personam maintainable dismissed as improvidently granted where record revealed that libel in rem to recover the same amount was maintainable). In this case, affirmance would be justified on at least two grounds not raised in the Petition — limitations and standing.

The gravamen of Petitioners' fiduciary claims was that the terms of the Plan themselves violated ERISA's fiduciary duty provisions.[9] Petitioners do not seek certiorari with respect to any claim relating to the administration of the Plan.[10] The effective date of the MetLife Policy was January 1,

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9. As noted above, the Petition seeks certiorari only with respect to issues bearing on alleged breaches of fiduciary duties under ERISA. *See* note 4, *supra*.

10. The formulation of the first of Petitioners' Questions Presented contains the premise that "Respondents miscommunicated and/or failed to communicate information about the plan to Petitioners." Petition, i. Certainly, under some circumstances, non-communication or miscommunication of some kinds of information regarding an ERISA-governed plan raise questions of plan administration. *See, e.g., Varity Corp.*, 516 U.S. at 502. However, Respondent Sears respectfully suggests that no question regarding non-communication or miscommunication of the Plan's terms is presented in this case.

(Cont'd)

1989.[11] The terms of the Allstate Policy were in effect before January 1, 1989. Petitioners' actions were commenced more than six years later, well outside the limitations period for fiduciary claims. ERISA § 413, 29 U.S.C. § 1113. Therefore summary judgment dismissing Petitioners' fiduciary claims was properly granted, notwithstanding the issues as to which Petitioners seek review here.

In addition, insofar as they sought to litigate the legality of the changes in the terms of the Plan resulting from the adoption of the MetLife Policy as a substitute for the Allstate Policy in 1989, Petitioners failed to satisfy the "case or controversy" requirement of Article III, Sec. 2. The "irreducible constitutional minimum" for Article III standing requires the presence of three elements: (1) the plaintiff must have suffered an injury in fact — that is, the invasion of a legally protected interest which is "concrete and particularized;" (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *United States v. Hays*, 515 U.S. 737, 742-43 (1995) (citations omitted). It is undisputed that Petitioner

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(Cont'd)

The District Court found as an undisputed fact that "the changes in the Sears Plan accompanying its switch to MetLife were distributed in 1989 to all of the Plan's participants, including Plaintiffs." *McCurdy v. Metropolitan Life Ins. Co.* (N.D. Ala. Mar. 31, 2000), *reprinted in* Petition, at 6a. Petitioners did not contest this finding in the Court of Appeals. As to Petitioners' lack of reliance on any documents alleged to contain misrepresentations, *see* 15, *supra*.

11. The application for the MetLife Policy was executed by an authorized officer of Sears on February 23, 1990, more than six years prior to the commencement of Petitioners' actions.

White's rights under the Plan were not affected adversely by any change in the terms of the Plan that resulted from the adoption of the MetLife Policy. Petitioner McCurdy's Plan benefits were suspended for five months when his claim for Social Security disability benefits remained pending after 24 months of Plan benefits, but before his action was commenced, Social Security disability benefits were awarded to him and Plan benefits were reinstated retroactively to the date of their suspension. Thus Petitioner White suffered no injury in fact as the result of the adoption of the MetLife Policy, and Petitioner McCurdy cannot show that any injury he may have suffered would be redressed by a judgment that any provision of the MetLife Policy that differed from the corresponding provision of the Allstate Policy was invalid.

CONCLUSION

For all of the foregoing reasons, Respondent Sears, Roebuck and Co. respectfully requests that the Petition be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(3)

No. 01-404

IN THE

Supreme Court of the United States

WILLIE WHITE and CLARENCE MCCURDY, individually and on behalf of all persons similarly situated,

Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC., SEARS ROEBUCK COMPANY, INC. and ALLSTATE INSURANCE COMPANY INCORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Because the Respondent, Sears, Roebuck and Co., ("Sears") has not provided any relevant response to the issues presented by Willie White, Clarence McCurdy and all similarly situated class members (collectively "Petitioners"), and due to the lack of an opposition to the Petitioners' position from the Respondents, Metropolitan Life Insurance Company, Inc., ("MetLife") and Allstate Insurance Company ("Allstate"), the Petitioners respectfully urge this Court to grant their petition for writ of certiorari previously submitted.

I. This Court's opinion in *Variety Corporation v. Howe*, is controlling authority for the facts of this case and Sears' inability to distinguish this case and justify the lower courts' departure from its holding is grounds for certiorari review.

As the Respondent correctly identifies in its brief, the crux of the Petitioners' petition as it relates to the employer, Sears, focuses on the breach of fiduciary duty to communicate accurate and material information to the Petitioners (plan participants) regarding long-term disability benefits. In an endeavor to absolve itself from the fundamental obligation of a plan fiduciary, Sears first attempts to persuade this Court that its conduct, as it relates to the information provided to the Petitioners in this regard, is not subject to review under the fiduciary standards prescribed by the Employee Retirement Income Security Act ("ERISA").

Namely, Sears argues that it is not subject to review as a fiduciary because it has been determined that a plan sponsor who is engaged in the process of modifying, amending or terminating an employment benefit plan is not performing fiduciary activities as contemplated by ERISA. *See e.g., Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). However, this Court makes a distinction from

situations where a plan sponsor merely alters or amends welfare benefit plans from circumstances where a plan sponsor exercises discretionary authority or control over the plan management or administration of the plan. In the latter scenario, plan administrators are subject to fiduciary obligations and liabilities prescribed by ERISA. *Lockheed Corp. v. Spink*, 517 U.S. at 890. This Court has found that a plan sponsor exercises such discretionary authority when it communicates information regarding the future of plan benefits to plan participants. *See Variety Corporation v. Howe*, 516 U.S. 489, 505 (1996).

As stated above, the Petitioners specifically maintain that Sears, as well at the other Respondents, had a fiduciary duty to communicate complete and accurate information material to the plan and the disability benefits provided therefrom. In *Variety Corporation v. Howe*, *supra*, as in the present case, the employer made representations to the plan participants that there would be **no change in coverage** and any transfer in the administration of disability benefits would not undermine or affect the security of those benefits. *Variety*, 516 U.S. at 501. Because the record indicates that Sears actively participated in the transmission of the alleged inaccurate and misleading information regarding the change in coverage in the future administration of disability benefits owed to the Petitioners, it cannot escape responsibility and liability as a plan fiduciary.[1]

Sears next argues that even if it is subject to fiduciary standards, the Petitioners' description of its conduct does not rise to the level of culpability required by *Variety*. According to Sears' interpretation of this Court's holding in *Variety*, a

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1. Of course, Respondents, MetLife and Allstate are equally culpable parties as plan administrators and fiduciaries, even though the Petitioners have directed their response to the arguments made by the Respondent, Sears in its opposition brief.

plan participant must prove that a plan fiduciary "knowingly and significantly" deceived a plan beneficiary before having an actionable claim under the fiduciary provisions of ERISA. The Petitioners respectfully submit that there is nothing elicited in the *Variety* opinion to support such a narrow and restricted application of law. Instead, this Court in *Variety* encourages plan sponsors or administrators to exceed the statutory fiduciary obligations when communicating information about plan benefits to a plan participant.

> Administrators, as part of their administrative responsibilities, frequently offer beneficiaries more than the minimum information than the statute requires — for example, answering beneficiaries' questions about the meaning of the terms of a plan so that those beneficiaries can more easily obtain the plan's benefits. To offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially the same kind of plan-related activity.

Id. at 502-03, *citing* Restatement (Second) of Agency § 229(1) (1957).

While the *Variety* decision does not address whether ERISA imposes a duty on fiduciaries to voluntarily disclose information or to respond to inquiries from plan participants, the Eleventh Circuit has determined that an employer's **affirmative misstatement** as well a **failure to disclose information** regarding long-term disability benefits could constitute a breach of fiduciary duty under ERISA. *Hamilton v. Allen-Bradley Co., Inc.*, 244 F.3d 819, 1323 (11th Cir. 2001). To justify its holding, the Eleventh Circuit Court borrowed language from the Ninth Circuit opinion of *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1403

(9th Cir. 1995), which held that a "'fiduciary has an obligation to convey complete and accurate information material to the [plan participant's] circumstance, even when the [plan participant] has not asked for the information.'" *Hamilton v. Allen-Bradley Co., Inc.*, 244 F.3d at 1322.

For additional support for its decision, the *Hamilton* Court looked to authority established in the Third Circuit case of *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1016 (3d Cir. 1997), wherein the fiduciary was required to have "an attendant duty of loyalty which requires that he not only avoid misstatements but also 'an affirmative duty to inform . . . when . . . silence might be harmful,'" and from the Sixth Circuit case of *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988), holding that "plan fiduciaries have a 'duty not to make misrepresentations either negligently or intentionally, to . . . plan participants.'" *Id.* at 1322-23.

Regardless of whether Sears' representations to the Petitioners that there would be no change in the amount of coverage under the MetLife plan constituted a mistakenly inaccurate communication, or a knowingly deliberate miscommunication, the duty and the result are the same. The content of the information was misleading to the Petitioners and they have presented evidence of their resulting injuries and damages. Again, the Petitioners submit that Sears, including the other Respondents, have failed to comply with their fiduciary obligations as plan sponsors or administrators within the spirit of *Variety* and its progeny.

Any other effort by Sears to distinguish *Variety* from this case fails to demonstrate any material differences. In fact, most of the claims by Sears concerning any distinctions are deliberately misstated and insignificant. For example, the fact that Petitioners McCurdy and White cannot verify with certainty that they received documents or reviewed films

presented by Sears, in no way precludes a claim for breach of fiduciary on behalf of the class. The record shows that this material information, inaccurately and falsely represented, was sent out and read by more than 130,000 employees, who are class members in this action. In any event, the Petitioners' reliance on the alleged misrepresentations are factual questions and not properly determined at the summary judgment level.

CONCLUSION

In consideration of the above and forgoing, including the petition previously submitted, the Petitioners respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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